RIGHT TO KNOW ADVISORY COMMITTEE

DRAFT AGENDA
October 21, 2010
1:00 p.m.
Room 438, State House, Augusta

Convene

1. Welcome and Introductions
   Senator Barry Hobbins, Chair

2. Subcommittee Reports

   A. Legislative Subcommittee, Chris Spruce, Chair

   B. Bulk Records Subcommittee, Bob Devlin, Chair
      Next meeting scheduled for October 27, 2010

   C. Public Records Exceptions Subcommittee, Shenna Bellows, Chair
      Update from meeting on October 18, 2010

3. Education and training for elected public officials - continuing discussion

4. Other old business

5. New business

6. Scheduling future meetings, subcommittee meetings
   Currently scheduled after 10/21/10:
   - Bulk Records Subcommittee: 10/27/10 at 10:00 a.m.
   - Full Committee: 11/18/10 at 1:00 p.m.

Adjourn

Draft for Review on 10/21/10

Right to Know Advisory Committee
Legislative Subcommittee
DRAFT: Public records and proceedings training

Sec. #. 1 MRSA §412 is amended to read:

§412. Public records and proceedings training for certain elected officials

1. Training required. ~~Beginning July 1, 2008, an~~ An elected official subject to this section shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The official shall complete the training not later than the 120th day after the date the elected official takes the oath of office to assume the person's duties as an elected official. ~~For elected officials subject to this section serving in office on July 1, 2008, the training required by this section must be completed by November 1, 2008.~~

1-A. Training for certain appointed officials. Beginning July 1, 2011, an appointed county clerk or municipal clerk shall complete a course of training on the requirements of this chapter relating to public records and proceedings. The appointed clerk shall complete the training not later than the 120th day after the date the appointed clerk takes the oath of office to assume the person's duties. For appointed clerks subject to this section serving in office on July 1, 2011, the training required by this section must be completed by November 1, 2011.

2. Training course; minimum requirements. The training course under ~~subsection~~ subsections 1 and 1-A must be designed to be completed by an official in less than 2 hours. At a minimum, the training must include instruction in:

A. The general legal requirements of this chapter regarding public records and public proceedings;

B. Procedures and requirements regarding complying with a request for a public record under this chapter; and

C. Penalties and other consequences for failure to comply with this chapter.

An elected official or appointed clerk meets the training requirements of this section by conducting a thorough review of all the information made available by the State on a publicly accessible website pursuant to section 411, subsection 6, paragraph C regarding specific guidance on how a member of the public can use the law to be a better informed and active participant in open government. To meet the requirements of this subsection, any other training course must include all of this information and may include additional information.

3. Certification of completion. Upon completion of the training course required under subsection 1, the elected official or appointed clerk shall make a written or an electronic record attesting to the fact that the training has been completed. The record must identify the training

completed and the date of completion. The elected official or appointed clerk shall keep the record or file it with the public entity to which the official was elected.

4. Application. This section applies to the following ~~elected~~ officials:

A. The Governor;

B. The Attorney General, Secretary of State, Treasurer of State and State Auditor;

C. Members of the Legislature elected after November 1, 2008;

D.

E. The following county government officials who are elected: ~~Commissioners~~, commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members ~~of county governments~~;

E-1. Appointed county clerks;

F. The following municipal government officials who are elected: ~~Municipal~~ municipal officers, clerks, treasurers, assessors and budget committee members ~~of municipal governments~~;

F-1. Appointed municipal clerks;

G. Elected ~~Officials~~ officials of school units and school boards; and

H. Elected ~~Officials~~ officials of a regional or other political subdivision who, as part of the duties of their offices, exercise executive or legislative powers. For the purposes of this paragraph, "regional or other political subdivision" means an administrative entity or instrumentality created pursuant to Title 30-A, chapter 115 or 119 or a quasi-municipal corporation or special purpose district, including, but not limited to, a water district, sanitary district, hospital district, school district of any type, an airport authority established pursuant to Title 6, chapter 10, transit district as defined in Title 30-A, section 3501, subsection 1 or regional transportation corporation as defined in Title 30-A, section 3501, subsection 2.

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Other issues previously discussed:

- Require training for legislators every year (or session?), even those trained in prior sessions
- Require training for all appointed officials who perform the same tasks as elected officials who are required to complete training
- Require training for all supervisors who oversee the work of officials who are required to have training
- Initial training enough or repeated training at some interval?

Redraft for Review on 9/23/10

Right to Know Advisory Committee
Legislative Subcommittee
DRAFT: Confidential communications

Sec. 1. 1 MRSA §402, sub-§5 is enacted to read:

5. Public officials' communications. A record involving communications between a person and a public official is a public record except for information contained in the record that:

A. Is excepted from the definition of public record in subsection 3;

B. Is designated as confidential by statute; or

C. Would be confidential if it were in the possession of another public agency or official.

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(1)

Legislator/Elected Official E-mail

Colorado

24-72-202 (6)(II)

(II) "Public records" includes the correspondence of elected officials, except to the extent that such correspondence is:

(A) Work product;

(B) Without a demonstrable connection to the exercise of functions required or authorized by law or administrative rule and does not involve the receipt or expenditure of public funds;

(C) A communication from a constituent to an elected official that clearly implies by its nature or content that the constituent expects that it is confidential or a communication from the elected official in response to such a communication from a constituent; or

(D) Subject to nondisclosure as required in section 24-72-204 (1).

Montana

2-6-102. Citizens entitled to inspect and copy public writings. (1) Every citizen has a right to inspect and take a copy of any public writings of this state, except as provided in 22-1-1103, 22-3-807, or subsection (3) of this section and as otherwise expressly provided by statute.

(2) Every public officer having the custody of a public writing that a citizen has a right to inspect is bound to give the citizen on demand a certified copy of it, on payment of the legal fees for the copy, and the copy is admissible as evidence in like cases and with like effect as the original writing. The certified copy provision of this subsection does not apply to the public record of electronic mail provided in an electronic format.

(3) Records and materials that are constitutionally protected from disclosure are not subject to the provisions of this section. Information that is constitutionally protected from disclosure is information in which there is an individual privacy interest that clearly exceeds the merits of public disclosure, including legitimate trade secrets, as defined in 30-14-402, and matters related to individual or public safety.

(4) A public officer may withhold from public scrutiny information relating to individual privacy or individual or public safety or security of public facilities, including jails, correctional facilities, private correctional facilities, and prisons, if release of the information may jeopardize the safety of facility personnel, the public, or inmates of a facility. Security features that may be protected under this section include but are not limited to architectural floor plans, blueprints, designs, drawings, building materials, alarms system plans, surveillance techniques, and facility staffing plans, including staff numbers and locations. A public officer may not withhold from public scrutiny any more information than is required to protect an individual privacy interest or safety or security interest.

New Jersey

47:1A-1.1 Definitions

A government record shall not include the following information which is deemed to be confidential for the purposes of P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented:

- information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, unless it is information the constituent is required by law to transmit;

- any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members;

Rhode Island

§38-2-2 Definitions.

(4) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, computer stored data (including electronic mail messages, except specifically for any electronic mail messages of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities) or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. For the purposes of this chapter, the following records shall not be deemed public:

(A) All records which are identifiable to an individual applicant for benefits, client, patient, student, or employee, including, but not limited to, personnel, medical treatment, welfare, employment security, pupil records, all records relating to a client/attorney relationship and to a doctor/patient relationship, and all personal or medical information relating to an individual in any files, including information relating to medical or psychological facts, personal finances, welfare, employment security, student performance, or information in personnel files maintained to hire, evaluate, promote, or discipline any employee of a public body; provided, however, with respect to employees, the name, gross salary, salary range, total cost of paid fringe benefits, gross amount received in overtime, and other remuneration in addition to salary, job title, job description, dates of employment and positions held with the state or municipality, work location, business telephone number, the city or town of residence, and date of termination shall be public.

. . .

(M) Correspondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities.

(ii) However, any reasonably segregable portion of a public record excluded by this section shall be available for public inspections after the deletion of the information which is the basis of the exclusion, if disclosure of the segregable portion does not violate the intent of this section.

Delaware

Title 29, § 10002. Definitions.

(g) "Public record" is information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored,

recorded or reproduced. For purposes of this chapter, the following records shall not be deemed public:

> (16) Emails received or sent by members of the Delaware General Assembly or their staff;
>
> (19) Any communications between a member of the General Assembly and that General Assembly member's constituent, or communications by a member of the General Assembly on behalf of that General Assembly member's constituent, or communications between members of the General Assembly.

Texas

Sec. 552.109. EXCEPTION: CERTAIN PRIVATE COMMUNICATIONS OF AN ELECTED OFFICE HOLDER. Private correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy are excepted from the requirements of Section 552.021 *(availability of public information)*.

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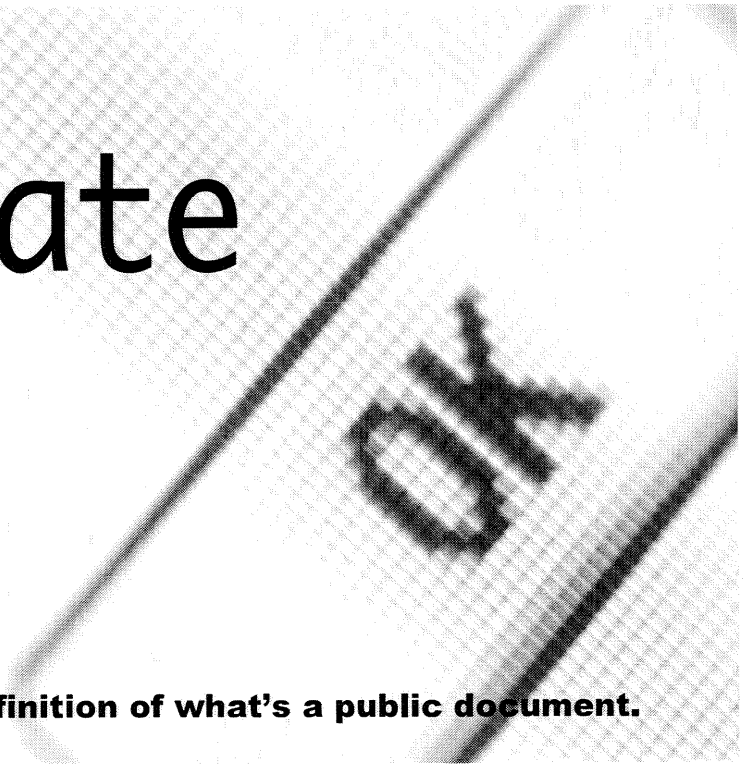
The Private Life of E-Mail



The digital age has complicated the definition of what's a public document.

BY PAM GREENBERG

What's public some of the time, private some of the time, and potentially confusing almost all of the time?

If you're a state legislator, it's probably your e-mail.

Consider this scenario. You're at your desk on the House floor, thumbing through e-mail messages on your personal BlackBerry. One message is from your wife, asking if you will be at parent teacher conferences. Another message is a BlackBerry "PIN" message from a lobbyist, explaining her position on a bill coming up for a vote. On the desk in front of you is your state-owned laptop, which displays messages from constituents in your state e-mail account. Another window on the laptop is opened to your private Yahoo e-mail account. In yet another browser window, your Facebook page is open, showing the messages you've sent to your friends, constituents and legislative colleagues.

Which of these communications is a public record? Which messages will you save, and which will you delete? The answer can depend on the state you live in, the content of the messages, court rulings and how your state's constitution is written.

Openness and transparency in government are essential democratic principles that foster accountability, promote the public trust and prevent abuses by those in power. But there are important privacy interests and fundamental constitutional doctrines that require a careful balancing act when considering public records laws. E-mail and new technologies create added complexities and challenges to the debate.

Author credit: Pam Greenberg follows public records and technology issues for NCSL.

> *"When it comes to private conversations, there's a difference between need to know and want to know."*
>
> DELAWARE HOUSE MAJORITY LEADER PETER C. SCHWARTZKOPF

WHAT'S PRIVATE?

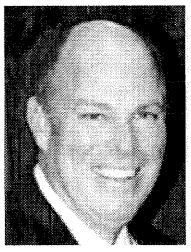
In six states—Colorado, Delaware, Montana, New Jersey, Rhode Island, Texas—statutes specifically address whether legislators' e-mails are considered public records. In most of these states, the laws are the result of a balancing act between the public's right to know and an individual's right to privacy.

In Delaware, the balancing act surfaced earlier this year when the General Assembly considered amending the state's Freedom of Information Act. The bill brought the legislature under the same public records and open meetings provisions that applied to other government officials and agencies. The bill was at risk of failing because some lawmakers felt legislators' e-mails should be kept private.

"One of their biggest concerns was that we have so many e-mails from constituents talking about sensitive problems, problems with health care, and some are very descriptive," says Delaware House Majority Leader Peter C. Schwartzkopf. "We support open government and the public's right to know, but quite frankly, constituents bare their souls to us sometimes. When it comes to private conversations, there's a difference between need to know and want to know."

That does not mean, however, that the e-mails are protected in criminal proceedings or investigations of wrongdoing, he says.

In a blog posting about the Legislature's public records law, former Utah Senator David L. Thomas described another reason why some legislators want to keep their e-mail correspondence private. "Citizens have a right of privacy in personal and confi-



HOUSE MAJORITY LEADER PETER C. SCHWARTZKOPF DELAWARE

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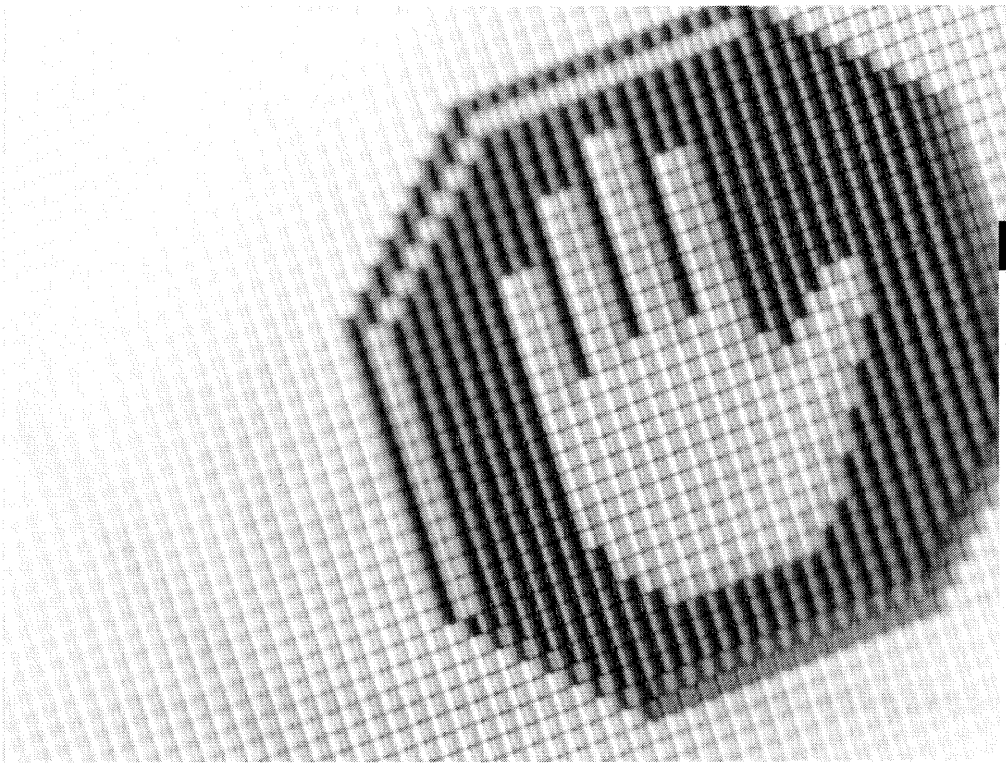


dential correspondence, without which their constitutional right to petition their government would be negatively affected," he says. "No right to privacy means no whistle-blowers. Citizens want to feel secure in contacting their elected representatives without the fear that someone is spying on them."

But open government groups don't see it that way.

"It's not very often I talk to citizens who want their e-mail private," says Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press. "Citizens generally want help, and unless their message falls into the category of sensitive medical or financial information, it should be public. If the message is that sensitive, you should be able to make some of the exemptions in your regular state public records law apply to that communication."

CONSTITUTIONAL QUESTION

Legislators are often criticized for exempting themselves from public records laws that apply to other public officials. In some states, however, the exemptions are the result of long-standing state constitutional provisions similar to the U.S. Constitution's Speech or Debate Clause. Speech and debate provisions grant legislators a "legislative privilege" in connection with legislative work, freeing them to deliberate candidly without intimidation from the judicial or executive branch.

Steven Huefner, a law professor at the Michael E. Moritz College of Law at Ohio State University, says without these protections, the legislative process could be harmed, "diminishing legislators' willingness to think creatively, solicit diverse opinions and advice, or explore what in hindsight turn out to be blind alleys."

This legislative privilege has been cited in a variety of court rulings, attorney general opinions and other disputes that have resulted in conflicting decisions about the privacy of

ARE IMS A MEETING?

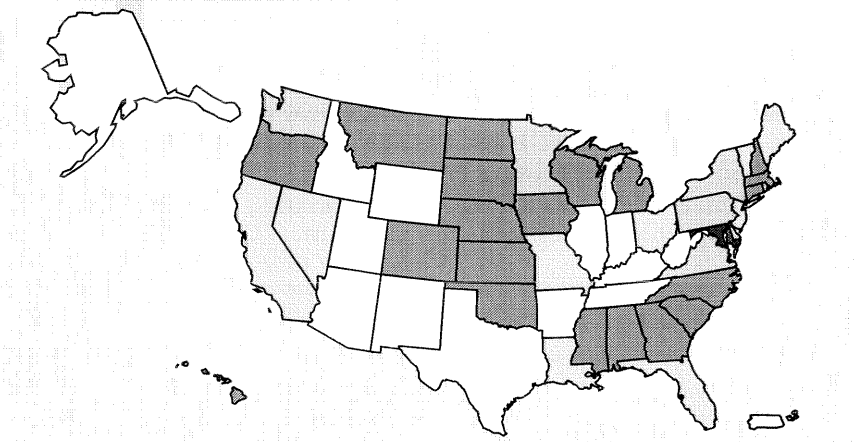
Courts have consistently found e-mails are more like a memo than a conversation. But what about instant messages, text messages and chat rooms?

In Virginia, the state Supreme Court ruled e-mails among three or more members of a public body are not subject to open meeting requirements because they do not constitute "immediate comment and response." The court noted, however, that "some electronic communication may constitute a 'meeting,' and some may not."

It specifically noted that in Internet chat rooms or instant messaging, the communication is virtually simultaneous and could be considered a public meeting.

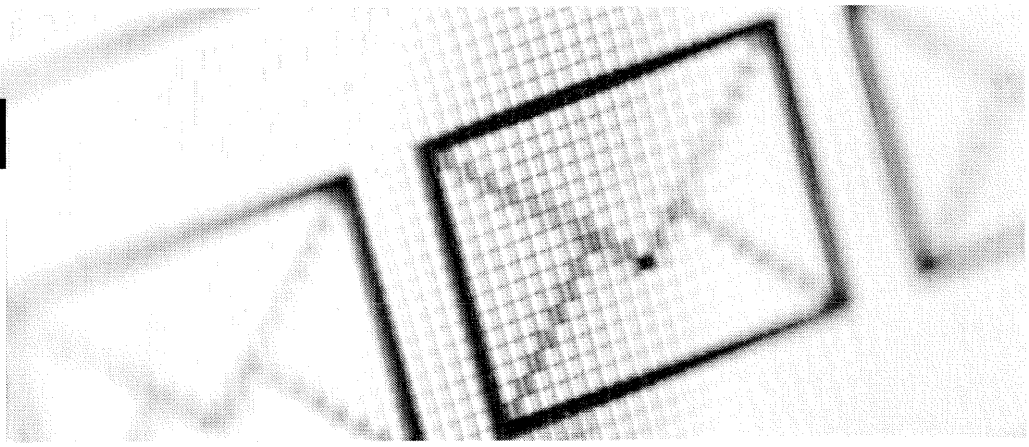
The Missouri General Assembly confirmed this view in legislation passed in 2006. Meetings conducted through conference call, videoconference, Internet chat or Internet message board can be public meetings if any public business is discussed or decided, or if public policy is formulated. The law also requires a notice of these types of meetings to be posted in advance on a public website.

LEGISLATIVE RULES GOVERNING ELECTRONIC DEVICES



Note: Nebraska and the Virgin Islands both have unicameral legislatures.

MANAGING "SMOKING" E-MAIL



Advances in technology and the growth of electronic communications have elevated the importance of electronic evidence. In fact, information stored in computers and on electronic devices frequently is the "smoking gun" in litigation.

In 2006, the Federal Rules of Civil Procedures were amended to require federal courts to treat electronic documents the same as paper documents in litigation discovery requests. Almost half the states have adopted specific rules to manage electronic discovery, often referred to as e-discovery.

"Most states require that, when there is 'reasonable anticipation of litigation,' records—paper and electronic—must be preserved in case they must eventually be disclosed," says Robert Joyce, a professor of public law and government at the University of North Carolina.

The changes in discovery requirements have created significant challenges for government.

More than 95 percent of a typical state agency's documents are in electronic form, according to Gary Robinson, the former chief information officer in Washington state who chaired an e-discovery working group for the National Association of State Chief Information Officers.

E-discovery requests can include extremely volatile information such as e-mail, voice mail, instant messages, wikis and blogs, and other communications delivered through or stored via the Internet. Because of the difficulty of identifying where information is located and how it can be retrieved, e-discovery obligations can be very expensive. If a party in litigation is unable to locate and retrieve discoverable information, he may be penalized for his failure, and that could hurt his chances of winning the lawsuit.

E-discovery is proving to be a strong motivator for states to strengthen records management and digital preservation efforts.

Jo Anne Bourquard, NCSL

legislative records and communications.

Other kinds of state constitutional provisions also come into play.

In Delaware, for example, legislators heard conflicting legal opinions about whether their proposed legislation was constitutional.

"The state's constitution says one General Assembly cannot bind the hands of the next," says Schwartzkopf, "so there was discussion about putting the FOIA provisions in legislative rules instead of statute. But the bottom line is that we expect other political divisions to operate under FOIA, so there's no reason we shouldn't hold ourselves to that standard."

CONTENT IS KEY

In some states, including Alaska and Florida, the content of a message—regardless of format or physical characteristics—determines if it's a public record.

"The mere fact that an e-mail message is received on a government computer issued to a public official for the conduct of the public's business does not of itself make the e-mail message a public record," says Robert Joyce, a professor of public law and government at the University of North Carolina. "The invitation to go bowling does not become a public record just because it was received on a government computer."

And just because an e-mail message is received on a personal home computer or BlackBerry does not, in itself, mean the e-mail is not a public record.

In Alaska, former Governor Sarah Palin regularly used her private Yahoo e-mail account instead of the state e-mail system to communicate with aides and to conduct state business. An Alaska Superior Court judge in August ruled just because the records related in some way to state business didn't mean they were necessarily public record.

A 2003 Florida Supreme Court decision also illustrates the content versus format question. A Florida newspaper had requested all the e-mails of two city employees, arguing that it was entitled to them since they were made on publicly owned computers. The employees sorted the e-mails, and supplied only those that related to official business. Deciding in favor of the employees, the court held that the determining factor of whether a document is a public record lies in the nature of the record, not its physical location. Personal e-mails, the court said, do not fall within the scope of the transaction of official business and therefore are not public records.

> *"If the message is that sensitive, you should be able to make some of the exemptions in your regular state public records law apply to that communication."*
>
> LUCY DALGLISH, EXECUTIVE DIRECTOR, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

TECHNOLOGY OUTSTRIPS THE LAW

BlackBerries, iPhones and other devices are becoming essential tools for many state lawmakers, but their text messaging capabilities in particular are raising new questions.

"They might make it easier to communicate with constituents and other legislators, but there's really no functional difference in writing a message and a letter," says Dalglish. "Many public officials think that using a BlackBerry is like a telephone conversation, but it's not a phone call, it's a memo. If you don't want something to be part of the permanent record, pick up the phone. Courts have consistently found that e-mails are more like a memo than a conversation."

(7)

Handheld devices also come with new features that can create more questions. In Florida, staff and commissioners of the Public Service Commission used PIN numbers to exchange messages BlackBerry-to-BlackBerry with Florida Power & Light lobbyists. PIN messages usually do not pass through an e-mail server and are easily deleted, raising suspicion that the PINs were being used to circumvent public records laws. The local controversy also prompted some media outlets to question similar types of exchanges between lawmakers and lobbyists during legislative hearings.

NEW SITES, NEW CONCERNS

Social networking sites also are raising questions for public officials who use them. The city of Coral Springs, Fla., sought an attorney general opinion about whether a city Facebook page, and any communications and other information about the city's Facebook "friends" (including the friends' respective Facebook pages), would be subject to the state's public records laws. The attorney general said a determination would depend on whether the information was made or received as part of official business by or on behalf of a public agency. Commissioners' communications on the city's Facebook page could also be subject to Florida's Sunshine Law and its retention schedules. Some social media users might not be aware that even on sites that allow them to keep postings private, the information could be made available to anyone if required by public records laws, by the site's terms of use contract, or even by other "friends" or users.

Discussions about the open records implications of public officials' use of social media are also coming up in other states. A recent online article by Megan Crowley of the Utah Center for Public Policy and Administration suggests that public officials should analyze the content of their social media postings to determine if they fall under the state's Government Records Management Act. Questions Crowley suggests considering include: "Does the information exist in another or original format? Is the information meaningful in conducting government business and for how long? Is the social media page being presented by a person in an official government role, or is it presented as their own personal page?"

"The invitation to go bowling does not become a public record just because it was received on a government computer."

ROBERT JOYCE,
UNIVERSITY OF NORTH CAROLINA

In Washington, the State Archives website offers similar guidance to state and local government about the retention of posts on blogs, wikis and social networking sites such as Facebook and Twitter.

SAVE OR DELETE?

The proprietary nature of social media sites and the sheer volume of e-mail and text messaging may tend to discourage elected officials from saving messages that might otherwise be retained as part of the public record.

"The nature of e-mail works in some ways to make retention harder and in other ways to make it," says the University of North Carolina's Joyce.

"Retention is harder, on the one hand, because deleting is so easy and so tempting. It's easier, on the other hand, because long-term storage of data is technically quite possible."

Dalglish of the reporters group says the drive for open records has been underway for a long time and is a factor in this debate.

"We started passing public records laws decades ago. For citizens to be actively engaged in their communities, they need information," she says. "They need to know how decisions are being made and how their tax dollars are being spent, and they should have a presumptive access to that information. New technologies are a blessing and a curse."

FEW STATES DEAL DIRECTLY WITH E-MAIL

Six states specifically address in statute whether legislators' e-mail communications are public record.

- Colorado law classifies e-mail messages sent or received by legislators as public records, but exempts communications that a constituent "would have reason to expect to remain confidential."
- New Jersey law treats e-mail as a public record, but excludes information legislators receive from a constituent or concerning a constituent.
- In Rhode Island, e-mail messages between legislators and constituents or other elected officials are exempt from the public records law.
- Delaware excludes from public disclosure any e-mails received or sent by members of the Delaware General Assembly.
- Texas law prohibits public disclosure of electronic communications between citizens and members of the Legislature and the lieutenant governor unless the citizen authorizes disclosure.
- In Montana, all electronic messages used for transaction of official business are deemed public records, including constituent communications, "unless constitutionally protected by individual privacy interests."

CHECK OUT video of Washington state lawmakers debating an open records law at www.ncsl.org/magazine.

Website Recommendations

1. Have the questions in the Frequently Asked Questions section listed at the top and linked to the answers.
    - There are dozens of questions, some of which are rather long, so the simple process of linking the questions to the answers will make the page more accessible, as most people will probably only read a few answers.

2. Update the court opinions section.
    - Additional cases should be added to the court opinions page, including Maine Superior Court cases such as the LocatePlus.com case. Also, a sentence summarizing the main point of each case would be helpful.

3. Include a page listing what bulk information requests have been made.
    - It might be beneficial to include a listing of companies or organizations that have made bulk information requests, or include information on any inquiries made about the state of the FOAA with the AG's office or the committee. This would keep the public informed about the developing status of public information, and what is made available commercially.

4. Provide more detailed information about the use of social security numbers.
    - The table provided on the website listing each agency's policy towards the use and release of social security numbers is not particularly informative. It frequently lists "unwritten policies," "generally speaking," and the agency "does not make a practice of" in relation to when agencies share release social security numbers. It also uses undefined acronyms such as "TIN" numbers.

5. Provide a statement of policy in regards to the use and release of social security numbers.
    - It may be helpful to develop a state default policy for the use of social security numbers, and provide it on the website. The FOAA only mentions social security numbers in the Fisheries and Wildlife section of the act.

6. Provide some more guidance as to which committees are not public.
    - Basically just mention that if a committee is exempted by law or executive order, that it doesn't have to be public, and give the four criteria the court established for determining if a mixed governmental/non-governmental committee should be public.

7. Clarify to whom FOA requests can be made.
    - The answers seem to indicate a couple of times that they can be made only to elected officials and not appointed officials, or employees.

8. Explain the process of applying to the courts if there might be a violation.
    - Just provide a simple explanation of the process involved in filing a claim at the Superior Courts, and perhaps link to a form from the courts.

9. Correct the mention of mailing fees.
    - An answer in the FAQ section states that the statute allows the agency to charge mailing fees, but the statute doesn't mention it.

10. Provide a sample form for FOA requests.
    - The answer explains what a request should look like, but linking to a form is easy, and might eliminate confusion if someone doesn't read that part of the FAQ's.

11. Get a more visible placement for the Maine Right to Know link on Maine.gov.
    - Maine Right to Know is only mentioned in the FAQ section of the Maine.gov homepage, and it isn't linked from the answer. Maybe listing it under the "How Do I" section, or independently linking it on the side column, as most people won't know what they're looking for.

12. Add a link to the Public Meeting Calendar.
    - The Public Meeting Calendar is elsewhere on the Maine.gov site, and includes a listing of public meetings that people checking out Maine Right to Know would probably be interested in.

13. Provide information about InforME.
    - InforME isn't mention except in the links section of the RTK page, despite it being the primary source of electronic public access.

holding that "conjecture, without evidence of imminent harm, simply fails to meet the Board's burden of showing that Exemption 4 applies."

"The burden an agency has under the exemption to show clear and convincing poof of likelihood of harm is not easily met," said Charles Glasser, Bloomberg's attorney. "Judge Hellerstein just assumed the Fed's burden."

Mintz thought a better barometer to judge whether substantial harm would occur was the Fed's voluntary May 7 release of bank stress tests under its Supervisory Capital Assessment Program. Though the disclosure revealed that 19 of the largest banks would have to raise $100 billion to even be considered financially sound, there were no runs on those banks.

Resolving the split

Though Bloomberg won its suit, release of the records was stayed pending appeal. In September, Preska also granted a motion from the Clearing House Association — the nation's oldest banking association that represents Bank of America, Citigroup, J.P. Morgan Chase and Wells Fargo, among others — to intervene on behalf of the board because it claimed members relied on the promise of confidentiality when participating in the emergency lending programs.

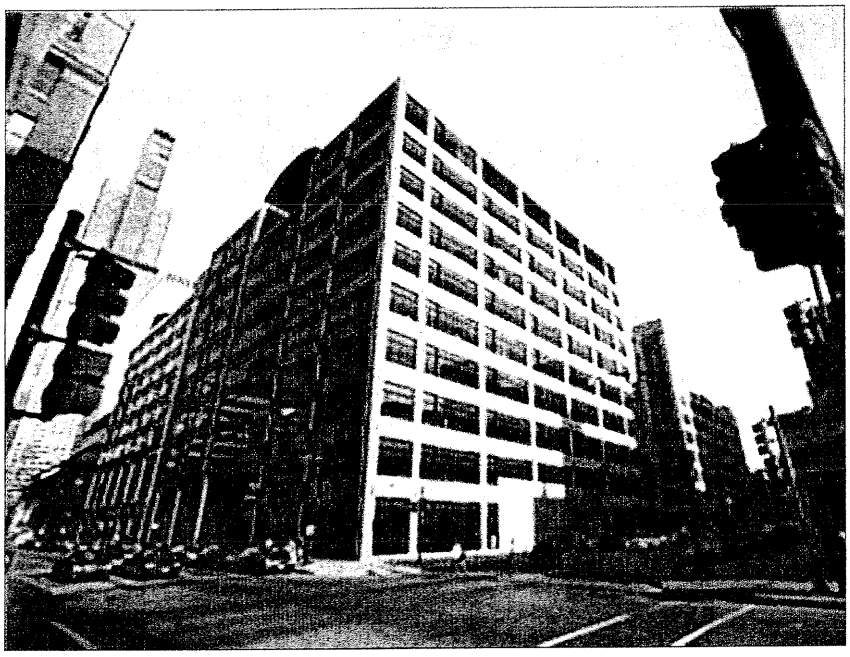
The fact that the Clearing House only intervened after the Fed lost is telling, some legal analysts say, given that the court will not consider new evidence now that the case has reached the appeals level. The Clearing House declined to comment on the matter.

Transparency advocates say the question of whether the board is exempt from disclosing lending records would be best answered by Congress.

"FOIA is created by Congress, which created 9 exemptions. If they want to create another one, they can," Mintz said. "Congress also passed The Federal Reserve Act, and if you turn through all those boring pages, nothing creates secrecy."

Critics say the push for secrecy from the Federal Reserve System contrasts sharply with President Obama's campaign promises for increased government transparency.

"It's disappointing . . . if the issue is transparency, then we have difficulty understanding what motivates anyone seeking transparency, advocating transparency, [into] descending secrecy and opacity," said Bloomberg's Editor-in-Chief Matthew Winkler during an interview. "Americans have the right to know how they became involuntary investors in this unprecedented bailout." ◆



Chicago-Kent College of Law runs an open government clinic.

Law schools step in to help maintain sunshine

Clinics spring up to help those who want access to government records and meetings

By Miranda Fleschert

When the District of Columbia denied WTOP Radio reporter Mark Segraves' Freedom of Information Act request for mayoral expense and travel records in February, the investigative reporter would have welcomed some assistance in appealing the denial.

"Recently it has become apparent that there is a need to litigate FOIA more now than there was before, but there just isn't the money to do that," Segraves said.

As circulations decrease and newsroom and radio station budgets dwindle, it's become increasingly difficult for news organizations to pursue what can often be protracted and expensive disputes over refused public records requests. In response, a few law schools have stepped in to guide citizens and groups through the open records process.

"Other institutions have to pick up the slack and one of the alternatives is NGOs and law schools," said Terrance A. Norton, the director of an open government clinic at Chicago-Kent College of Law.

A full-blown clinic is already up and running at Chicago-Kent College of Law. The Center for Open Government — the brainchild of Clinton Krislov, an adjunct professor and plaintiffs' class-action attorney — is a part of the school's clinical education program that helps citizens gain access to local and state government records and proceedings.

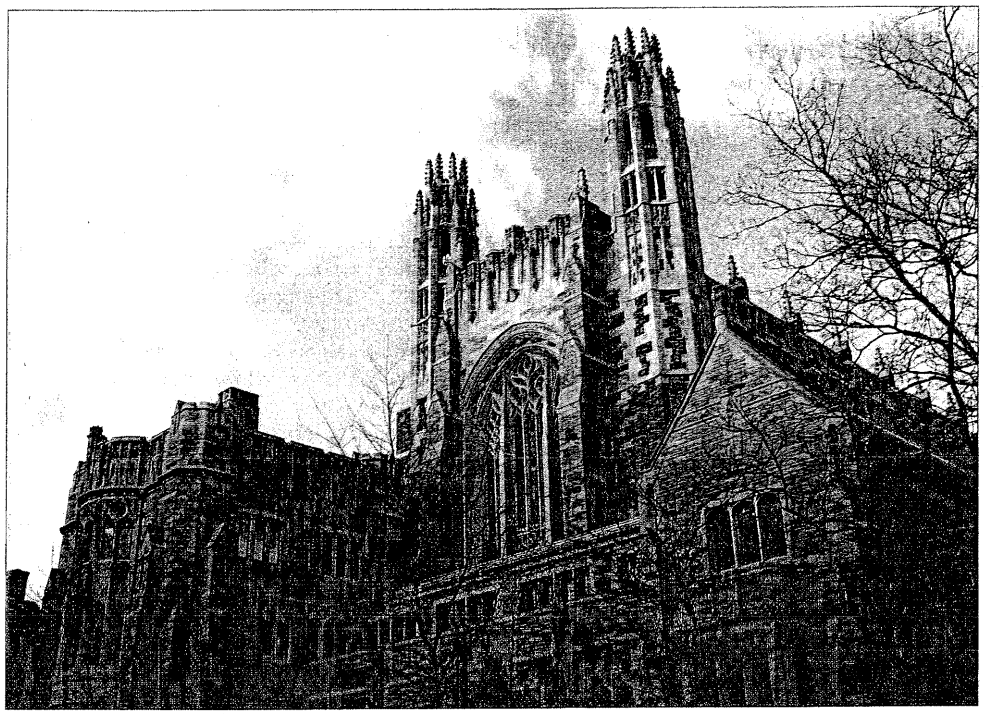
Chicago-Kent law students, with the help of supervising professors, will represent records requesters free of charge. The center will primarily handle cases dealing with violations of the state's open meetings and public records laws, which were revised earlier this year after a spate of recent state scandals that showed a lack of government transparency, according to the law school's press release.

"If laws are there for our benefit, we should be able to get all information necessary to find out what appointed and elected officials are doing with our tax dollars," Norton said.

Though the center just opened in September, students already have several cases

in the works. One woman from a local suburb sought help from the center after the village board of trustees, in a closed session, laid off 11 employees including her husband, a firefighter. The center will help her litigate what it argues is a violation of the state Open Meetings Act. Another client is a man seeking access to financial records from the Illinois High School Association to determine whether there are gender disparities in the funding of sports programs. IHSA, like the National Collegiate Athletic Association, has claimed it is not a public body and therefore not subject to open records laws.

Norton, a former Chicago-Kent professor who has handled open government cases for more than a decade, says that in addition to supplementing the open records lawsuits filed by media organizations, the clinic will close a gap in the nonprofit world. Eventually, it could expand to take on other issues, like whistleblower cases.



Yale Law School's program pairs students with lawyers to handle open government cases.

There are lawyers for minority groups, for those who are evicted from their homes, the developmentally disabled, victims of age discrimination, "but no lawyers to represent citizens who want to play a proper role in democracy, to move the levers of power," Norton said. "I think there is a need for citizens to have representation in whatever context."

The concept is promising, said David Tomlin, associate general counsel for the Associated Press. "Everyone is concerned now with pressure on budgets, and on personnel and staff time, that news organizations are going to do less litigating and less pursuing legal remedies in the area of First Amendment, open records and open meetings," he said. "It is clear that creative solutions are called for and this could be one of them."

Though Chicago-Kent's legal clinic is currently the only of its kind, other schools are also preparing students to litigate public records cases. At Yale Law School, students in its pracicum on media freedom, which is offered as an externship, are paired with practicing media lawyers and prepared to handle both state open government and FOIA cases at the federal level. "We are hoping it will be a really important institution for promoting media access to government information," said Jack M. Balkin, Yale's Knight Professor of Constitutional Law and the First Amendment and an adviser to the practicum.

Yale law student Nabiha Syed developed the idea for the practicum with a colleague after participating in a Yale clinic on balancing civil liberties and national security after 9/11. Balkin helped establish the program and connect students with media-law mentors.

"I care about the growing culture of secrecy in the law and this is what we need to go after. That was the push we needed to create the project," Syed said.

David Schulz, of Levine, Sullivan Koch & Schulz LLP in New York, supervises Syed's work and says that all types of journalists, from the solo blogger to the mainstream media, have shown an interest in working with the law students to resolve their disputes.

"The Yale program is very encouraging because there is a huge need for legal expertise as more and more journalists are working as independent bloggers or for online sites where they lack the resources of a larger organization," Schulz said.

As with Chicago-Kent's program, Yale's externship practicum is new this school year. Yet Syed has already been involved in four cases, including a whistleblower's appeal contesting a motion to seal exhibits in the case. She hopes other universities follow suit and get students involved in FOIA issues.

"There is a pressing need for law schools to take up this mantle," Syed said.

William G. McLain, an associate professor at the University of the District of Columbia's law school, agreed that law students can play an important role in FOIA litigation.

McLain first introduced his students to public records issues during a class on disaster and the law that dealt with the aftermath of Hurricane Katrina, including examining the issues surrounding the drowning deaths of inmates at a prison in New Orleans.

McLain's students filed a FOIA request with the District of Columbia's corrections department to find out whether Washington was any better prepared if a similar disaster occurred. The request was denied, citing homeland security concerns, and the appeal is pending in the D.C. Superior Court.

"These agencies [in the district] know that they can just stiff requesters and they'll just go away because they don't know what else to do. There is a need for representation and someone needs to step in and fill it," McLain said.

So McLain is preparing to meet the need and open a full-fledged public records clinic. Though the plan is still in its formation stage, he anticipates a strong interest from both colleagues and students — and estimates that given the district's high rate of records denials, there could be more cases than the clinic can even handle.

"It's really an idea that's time has come and if it hasn't come, it ought to immediately," McLain said. ◆

Reinsch, Margaret

From: Jeff Austin [jaustin@memun.org]
Sent: Friday, October 15, 2010 1:48 PM
To: Reinsch, Margaret
Cc: HylanBarr, Marion; Richard Flewelling
Subject: RE: Right to Know Advisory Committee - upcoming meetings

Hi,

Our policy committee met on Wednesday and reviewed the revised "meeting minutes" bill. They (approximately 65 officials) had a good discussion and in very non-binding fashion, voted to support the revised draft -- if it were to be amended further.

The amendment they would like is for the minutes obligation to be imposed only on municipal boards and committees that actually have some authority or power. I don't know how to draft that. But, they felt that purely advisory committees which meet to discuss issues and make recommendations but don't possess any power or authority should be required to keep meeting minutes. The meetings of these groups are open to the public to attend. But, it's tough to get volunteers and the burden to make and keep minutes, even cursory ones, is outweighed by any public benefit from such cursory minutes.

So, if the Right To Know Advisory Committee can craft some limiting language so that the obligation only applies to boards and committees with some authority, you are likely to get support from MMA's LPC. Since the bill is probably a mandate, albeit an inexpensive one, it will need a 2/3 vote. MMA support should help.

Obviously, MMA's policy committee may change its collective mind. But, it appears they can support an amended version of the draft.

Jeff

Prepared by Sean O'Mara
Right to Know Advisory Committee
October 21, 2010

Proposals for a Maine School of Law Based Freedom of Access Project

Summary

This report outlines possible means of supporting greater public access to government, in accordance with the goals of Maine's Freedom of Access statutes. The joined goals of greater access and accountability would be furthered by increased knowledge and legal empowerment of the people of Maine. In these proposals, this would be accomplished by connecting people to the resources of the Maine School of Law. By providing law students with the necessary tools and supervision, Maine can develop a program similar to those being developed in other states.

Current Status of Freedom of Access Resources

The Maine Legislature, acting on the recommendations of the Maine Right to Know Advisory Committee, has made significant and sweeping improvements to the state's access laws. This process is on-going and includes: greater educational outreach to public officials, greater accessibility to agencies via online media, and the development of more uniform agency statutes.

These efforts are best complemented by increased public awareness of their rights under the state statutes, particularly as these laws are amended. Only through an aware public will accountability throughout all public administration be achieved. The Maine Right to Know website, and Sunshine Week have begun this process by providing answers as to what rights are delineated in the law, but they are less effective at the point

of assisting individuals, and many of these answers are still inaccessible to members of the public.

The exact definition of what "reasonable translation costs" are, the amount of time that is a "reasonable period of time" to acknowledge receipt of FOA requests, and the problems of technology use for meetings are among the issues that have yet to be fully developed by the courts through litigation. The specific situations that often form the basis of statutory interpretation are usually not easily navigated by a layman. Moreover, an average citizen might not press his or her statutory FOA rights because of a lack of confidence or familiarity with the legal system.

The need for answers has been shown by the number of letters from constituents around the state to the Attorney General's Office. While responses to these letters addressing the general state of the law can be helpful, they are limited by the inability to represent individual citizens.

What Other States are Doing

To address these issues, a few law schools in other states have stepped into the gap. For over a year, the Chicago Kent College of Law has operated the Center For Open Government. http://www.kentlaw.edu/academics/clinic/cog.html This center is tasked with responding to the calls and e-mails of citizens of Illinois. The inquiries are researched and responded to by the three law students in the program, with all responses reviewed by the program's director.

This program was started by the efforts of two civil rights attorneys, with the attorneys providing the money for the program's budget, and the school providing the overhead. These two attorneys have taken on 4-5 cases that came through the program in the year since the program started. The law students do not directly represent clients, although they are currently looking into that option. Currently, the law students do some of the research and help with the filing of the claim. The program's director, Terrance Norton, indicated that the steady number of inquiries, and applications for representation have been increasing, and he expects them to increase more as awareness of the project increases. Journalists have made a significant number of these requests.

In Illinois, there is also a Public Access Counselor, whose role is to write decisions on freedom of access issues, which are binding unless appealed to the court system. Mr. Norton credits some of the success to authorization under the law for the award of attorney's fees upon successful litigation of a freedom of access case. Similarly, Yale Law School has created an externship where students work with media attorneys to prepare state access cases or federal FOIA requests and appeals. Other schools such as Columbia University School of Law have hosted open government workshops in cooperation with federal and state committees working on increased access via technology.

Possible Roles for the Maine School of Law

Here are four potential options for programs, depending on the level of need present, and available funding.

Option 1: Freedom of Access Clinic

The law school could create a program similar to that of Chicago-Kent. This option would provide citizens with the possibility of representation through associated attorneys, as well as responses to their inquiries, researched by the law students, and reviewed by a supervisor. If money could be raised from members of the local bar, or from another source, then Chicago-Kent's format of having a full-time director and secretary for the clinic would be possible. Mr. Norton estimated the yearly budget to be around $100,000.

If that level of funding were not available, then the clinic could be an expansion of an existing clinic. The supervision could be done by one of the attorneys, by a designated professor, or through the existing clinic. Students could be authorized as student-attorneys to represent some litigants in their appeals depending on the need.

Option 2: Freedom of Access Externship

In addition to the current externship with the Office of the Attorney General, an externship with a participating member of the local bar could be created to facilitate student representation of Freedom of Access requests. This option would not require additional funding, but would require a local attorney or attorneys to supervise the student-lawyer. This externship would be different than the current externship in that they would be capable of offering legal advice or assistance directly to the public.

Option 3: Freedom of Access Information Service

A member of the local bar or a professor could supervise a law student who would conduct research and respond to requests by members of the public over a designated e-mail account. The e-mail could be listed on the Maine Right to Know website, and made publicly available as a sort of help-line, with a law student drafting responses. This option would be inexpensive, and would provide people with some answer to their questions, but would not provide them with representation. This may be helpful for those who would have difficulty understanding their rights under the law. This position might also be restrictive in the ability of the student to offer legal advice due to potential liability.

Option 4: Freedom of Access Ombudsman

The law school could host a statutory Freedom of Access Ombudsman, with student support. This office is present in states such as Illinois and Indiana among others. The ombudsman, or public access counselor, would not provide legal representation, but could either write binding decisions, such as is the situation in Illinois, or could simply be an influential expert, whose opinions do not carry legal weight, but might help resolve freedom of access disputes.